CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 **APRIL 9, 1997** **NO. 15**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.ustreas.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

(T.D. 97–17)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts issued December 3, 1992, to May 10, 1994, inclusive, pursuant to subparts A and B, Part 191, Customs Regulations.

In the synopses below are listed for each drawback contract approved under title 19, United States Code, section 1313(a), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Customs regional commissioner who issued the contract, and the date on which it was approved.

Dated: March 20, 1997.

WILLIAM G. ROSOFF,
Director,
International Trade Compliance.

(A) Company: American Snack Coating Co.
Articles: Snack food coating system
Merchandise: Imported transitube biturbine
Factory: Pompano Beach, FL
Proposal signed: February 17, 1993
Basis of claim: Used in
Contract issued by RC of Customs: Miami, March 22, 1993

(B) Company: Culp Inc.
Articles: Printed paper; upholstery fabric; mattress ticking
Merchandise: High-quality "greige" paper
Factories: Burlington & Stokesdale, NC
Proposal signed: March 25, 1993
Basis of claim: Used in, less valuable waste
Contract issued by RC of Customs: Miami, May 14, 1993

(C) Company: Eureka Chemical Co.
Articles: Fluid film (corrosion control coating)
Merchandise: Wool grease, common degras; wool grease, fatty acids
Factory: South San Francisco, CA
Proposal signed: December 13, 1993
Basis of claim: Used in
Contract issued by RC of Customs: Long Beach (San Francisco Liquidation Unit): December 27, 1993

(D) Company: Formost Packaging Machines, Inc.
Articles: Wrapping machines
Merchandise: Wrapping machine component parts
Factory: Woodinville, WA
Proposal signed: March 24, 1994
Basis of claim: Used in
Contract issued by RC of Customs: Long Beach (San Francisco Liquidation Unit): April 21, 1994

(E) Company: Macklanburg-Duncan
Articles: Digital electronic level display units P250; P600/1200: DNM6 and Stabila
Merchandise: Printed circuit board assembly with electronic components & sensors
Factories: Oklahoma City, OK; San Jose, CA
Proposal signed: April 5, 1994
Basis of claim: Used in
Contract issued by RC of Customs: Long Beach (San Francisco Liquidation Unit): May 10, 1994

(F) Company: Mariani Packing Co., Inc.
Articles: Five grain muslix almond/fruit blend and crispy fluit blend
Merchandise: Dextrose coated, chopped, pitted dates
Factory: San Jose, CA
Proposal signed: March 19, 1994
Basis of claim: Appearing in
Contract issued by RC of Customs: Long Beach (San Francisco Liquidation Unit): April 12, 1994

(G) Company: Siecor Corp.
Articles: Fiber optic cable
Merchandise: Waterblock tape; waterblock yarn; black jacket compound
Factory: Hickory, NC
Proposal signed: March 30, 1993
Basis of claim: Used in
Contract issued by RC of Customs: Miami, May 14, 1993

(H) Company: Thermacote Welco Co.
Articles: Fluxcoated nickel silver and low-fume bronze welding wire; #2 and #5 stainless steel wire reels; filter plate glass, various cut sizes
Merchandise: Non-fluxcoated nickel silver and low-fume bronze welding wire; #25 stainless steel wire reels; filter plate glass sheets
Factory: Kings Mountain, NC
Proposal signed: December 8, 1992
Basis of claim: Used in
Contract issued by RC of Customs: Long Beach (San Francisco Liquidation Unit), February 17, 1993

(I) Company: Wilbanks International
Articles: Ceramic foils
Merchandise: Silicon carbide preforms
Factory: Hillsboro, OR
Proposal signed: October 19, 1992
Basis of claim: Used in
Contract issued by RC of Customs: Long Beach (San Francisco Liquidation Unit), December 3, 1992

(T.D. 97–18)

CUSTOMS COMMERCIAL GAUGER APPROVAL OF MARINE TECHNICAL SURVEYORS, INC.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of Marine Technical Surveyors, Inc., as a commercial gauger.

SUMMARY: Marine Technical Surveyors, Inc. has applied to U.S. Customs for approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13) at their Donaldsonville, Louisiana facility. Customs has determined that this facility meets all of the requirements for approval as a commercial gauger. Therefore, in accordance with Part 151.13(f) of the Customs Regulations, Marine Technical Surveyors, Inc.'s Donaldsonville, Louisiana site is approved to gauge the products named above in all Customs ports.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 151 of the Customs Regulations provides for the acceptance at Customs ports of laboratory analyses and gauging reports for certain

products from Customs accredited commercial laboratories and approved gaugers. Marine Technical Surveyors, Inc., of Donaldsonville, Louisiana has applied to Customs for commercial gauger approval. Customs has determined that Marine Technical Surveyors, Inc. meets all the requirements for approval as a commercial gauger. Therefore, in accordance with part 151.13(f) of the Customs Regulations, Marine Technical Surveyors, Inc.'s Donaldsonville, Louisiana site is approved to gauge the products named above in all Customs ports.

LOCATION:

Marine Technical Surveyors, Inc.'s approved site is located at: 125 Railroad Avenue, Donaldsonville, Louisiana 70346.

EFFECTIVE DATE: March 5, 1997

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Senior Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: March 19, 1997.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, March 31, 1997 (62 FR 15224)]

U.S. Customs Service

General Notices

ANNOUNCEMENT OF NATIONAL CUSTOMS AUTOMATION PROGRAM TEST OF ACCOUNT-BASED DECLARATION PROTOTYPE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces Customs' plan to conduct an account-based declaration prototype (NCAP/P) under the National Customs Automation Program (NCAP), and invites eligible importers to participate. The NCAP/P will be initially applicable to merchandise imported by truck through the ports of Laredo, Texas (Colombia Bridge only), and Detroit and Port Huron, Michigan. This notice provides a description of the test, outlines the development and evaluation methodology to be used in the test, sets forth the eligibility requirements for participation in the test and invites public comment on any aspect of the planned test.

DATES: The account-based declaration prototype (NCAP/P) will commence no earlier than August, 1997 and will run for approximately eighteen months, with evaluations of the prototype occurring periodically. All applications to participate in the test must be received on or before April 25, 1997. Public comments on any aspect of the planned test must be received on or before April 25, 1997.

ADDRESSES: Applications should be addressed to Ms. Margaret Fearon at U.S. Customs Service, 1301 Constitution Avenue, NW, Room 4139, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: For inquiries regarding eligibility of specific importers: Margaret Fearon, Process Analysis and Requirements Team, at (202) 927–1413. For questions on reconciliation: Shari McCann, Process Analysis and Requirements Team, at (202) 927–1106. For questions on other aspects of the Account-Based Declaration Prototype: Daniel Buchanan, Process Analysis and Requirements Team, at (617) 565–6236.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title VI of the North American Free Trade Agreement Implementation Act (the Act), Public Law 103–182, 107 Stat. 2057 (December 8,

1993), contains provisions pertaining to Customs Modernization (the Mod Act). Subtitle B of title VI establishes the National Customs Automation Program (NCAP)—an automated and electronic system for the processing of commercial importations. Section 631 in Subtitle B of the Act creates sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411–1414), which define and list the existing and planned components of the NCAP (section 411), promulgate program goals (section 412), provide for the implementation and evaluation of the program (section 413), and provide for remote location filing (section 414). Section 101.9(b) of the Customs Regulations (19 CFR 101.9(b)), concerns the testing of NCAP components. See, T.D. 95–21 (60 FR 14211, March 16, 1995).

A key element of Customs efforts to re-engineer its Trade Compliance process is a shift in emphasis from the traditional transaction-based approach of ensuring compliance with import laws and regulations to an account-based approach, which addresses an importer's overall compliance through account management, process reviews, and audits. One feature of this approach is a new account-based declaration process. Customs is also developing a new commercial processing system, the Automated Commercial Environment (ACE), which will be designed to support the new Trade Compliance processes. An account-based declaration prototype (NCAP/P) is being developed to provide the first operational demonstration of ACE capabilities for processing imports, integrating the new account-based import declaration process with other aspects of the Trade Compliance process and with selected features of NCAP elements of the Mod Act.

I. *Development Methodology:*

NCAP/P will be monitored by a Joint Prototype Team consisting of trade participants, the Customs Offices of Field Operations and Strategic Trade, the ACE Development Team, and other interested government agencies. This team will meet regularly throughout the prototype period in Detroit, Laredo and Washington, DC, to set development milestones, monitor progress, resolve issues and evaluate program effectiveness. The development effort will be coordinated with other on-going NCAP prototype programs such as Remote Location Filing and Reconciliation, and will be as consistent as possible with the overall direction of ACE development.

Potential participants should recognize that this is a prototype test of new processes. Data definitions and values and formats for electronic transmission of manifest, entry and commercial data will differ from those currently used in the Automated Commercial System (ACS). It is also important to note that development efforts undertaken for NCAP/P may not meet the eventual requirements for programs as they are finally implemented in ACE.

The public is invited to comment on any aspect of the NCAP/P test as described by this notice.

II. *Eligibility Requirements:*

In order to be eligible for participation in the NCAP/P, an importer must:

1. Be designated as one of the top 350 U.S. importers in terms of entered value, while importing no less than 50% of their merchandise specified as Customs' Primary Focus Industries, which are as follows:

a) Advanced Displays
b) Agriculture
c) Auto/Truck Parts
d) Automobiles
e) Bearings
f) Circuit Boards
g) Fasteners
h) Footwear
I) Manufacturing Equipment
j) Steel Products
k) Telecommunications
l) Textiles and Flatgoods
m) Wearing Apparel

Importers who are originally selected to participate will be eligible to continue to participate throughout the prototype period, regardless of their subsequent eligibility in regard to this requirement.

2. Be scheduled for, participating in, or, in the application, agree to undergo and cooperate fully with a Customs Compliance Assessment;

3. For Southern border NCAP/P shipments, use carriers who participate in the Land Border Carrier Initiative Program (LBCIP). No importer may enter Southern border cargo transported by non-participant carriers;

4. Agree in the application to file or maintain a continuous bond which will be obligated upon release of each NCAP/P shipment;

5. Be capable and/or agree to arrange for timely and accurate electronic transmission to Customs of all data required in the NCAP/P declaration process, including manifest and pre-release shipment data, additional data required to support physical examinations of cargo, entry summary data, detailed commercial data when requested, and reconciliation data. If an importer does not transmit electronic data for a particular shipment, Customs may exclude that shipment from NCAP/P processing. Participants who are unable to reliably provide timely transmission of required data may be suspended from further participation in this prototype; and

6. Be capable and/or agree to arrange for electronic payment of duties, taxes and fees. Participants who are unable to reliably provide timely transmission of required payments may be suspended from further participation in this prototype.

For NCAP/P, the following restrictions will be placed upon importers:

1. Importers must enter merchandise identified in the application as being from their typical commodities in their established

lines of business and coming from pre-identified sellers and shippers;

2. Importers must enter only the merchandise identified in the application as being within a range of pre-identified commodities (classified at the 6-digit HTS level);

3. Importers must enter merchandise conveyed on trucks operated by carriers pre-identified by participants in the application; and

4. Importers must enter merchandise for release into the commerce under a consumption entry at the port of arrival.

5. Importers must enter merchandise at the port of Laredo, Texas (Colombia Bridge only), or at Detroit or Port Huron, Michigan;

Importers may not enter merchandise in the NCAP/P if it is subject to antidumping or countervailing duty, quota, trade preference level or visa requirements, or pre-release reporting requirements imposed by other federal agencies. No prohibited or embargoed merchandise will be permitted in prototype shipments. In addition, importers may not enter NCAP/P merchandise into a warehouse or Foreign Trade Zone, or as an in-bond entry.

Importers are responsible for ensuring that ineligible merchandise is not included in NCAP/P shipments, and that all shipments aboard a conveyance are eligible for NCAP/P processing. Customs will exclude ineligible shipments from NCAP/P processing. Customs will monitor participating importers' compliance with these restrictions; participants who are unable to maintain a high level of compliance may be suspended from further NCAP/P participation.

III. *Application:*

Importers who wish to participate in NCAP/P must submit a written application including the following information:

1. Importer name;

2. Names and addresses of all their shippers for NCAP/P;

3. Names and addresses of all their seller/vendors for NCAP/P, and, for each seller/vendor identified, a listing of all the 6-digit HTS numbers in which the commodities to be imported are classified;

4. The issuer and number of the continuous surety bond which will cover all cargo processed under NCAP/P procedures;

5. Names and addresses of truck carriers who will be transporting NCAP/P shipments across the international borders;

6. Names and addresses of any customs brokers who will be filing declaration data;

7. The approximate total number of entries per month expected to be processed at each of the following locations:

Colombia Bridge, Laredo;
Ambassador Bridge, Detroit;
Windsor Tunnel, Detroit;
Blue Water Bridge, Port Huron;

8. Description of anticipated issues (from the eligible issues listed in Section VI of this Notice) and commodities for which the participant anticipates electing reconciliation;

9. For applicants not already scheduled for or participating in a Customs Compliance Assessment, a statement in which the applicant indicates agreement to undergo and cooperate fully with a Customs Compliance Assessment.

Customs will make admissibility determinations on NCAP/P shipments based on any cargo examinations and the information supplied with the application, which shall serve as a pre-filed entry for NCAP/P purposes.

Any importers who have applied to become NCAP/P participants will be notified in writing of their acceptance or rejection. If an importer's application for NCAP/P participation is accepted, Customs will assign the importer an NCAP/P Authorization Code. If an applicant is denied participation based on deficiencies in the application, the notification letter will include the reasons for that denial. Eligible importers whose initial applications are rejected may re-apply after correcting any deficiencies in the initial application.

Customs expects to initially limit NCAP/P participation to ten (10) importers. Preference will be given to applicants who indicate that they plan to maintain an average of at least 25 entries per month throughout the prototype period. Eligible importers whose initial applications are rejected may re-apply if Customs subsequently opens participation to additional participants. Customs will publish a notice in the Federal Register if an expansion of participation is planned.

IV. *Maintenance of Account Information:*

Following approval by Customs of an importer's application, each participating entry filer must provide Customs with a range of entry numbers to be reserved for assignment by Customs to NCAP/P shipments. Entry filers may not assign these numbers to other transactions, either for NCAP/P or for non-prototype entries.

Throughout the prototype period, participating importers must provide Customs with advance notification of any changes in the information provided in the application. This notification will be considered an amendment to the application. By notification of the participating importer, Customs may require that the participant not use a particular carrier, shipper, or seller, and not enter particular merchandise under this prototype.

V. *Remote Location Filing:*

Some aspects of remote location filing will be supported in NCAP/P. Under the remote location filing component, importers will be able to electronically file data with Customs from any place in the United States regardless of where the merchandise arrives. To qualify for remote location filing, a filer must be able to electronically transmit information on a shipment by shipment basis, including entry summary, invoice information (when required by Customs), and payment of duties, fees, and taxes. Use of the remote location filing component of the prototype is voluntary, but the same electronic data transmission requirements will apply for all prototype participants.

The designation of alternative locations for cargo examination will not be supported in NCAP/P. All cargo examinations will be conducted at the port where the cargo first arrives in the United States.

VI. *Reconciliation:*

Currently there are two reconciliation prototypes in operation or being implemented, in addition to the NCAP/P. The reconciliation test of Antidumping and Countervailing duties was published on May 10, 1996 (61 FR 21534). The "manual" reconciliation test, which covers reconciliation of certain value issues, was published on February 6, 1997 (62 FR 5673). (In 1995 a notice was published in the Federal Register concerning a reconciliation prototype for related party importers making upward adjustments to the price of imported merchandise, pursuant to 26 U.S.C. 482. This prototype did not become operational.)

Importers are reminded that reasonable care is required for all phases of reconciliation, including, but not limited to, submitting information on the underlying entries, flagging the underlying entries for reconciliation, grouping the outstanding issue(s) from the range of entries onto the Reconciliation and providing the final information on the Reconciliation.

Reconciliation permits those elements of an entry, other than those related to admissibility, which are undetermined at the time of entry summary filing, to be provided at a subsequent time. For merchandise processed in the NCAP/P, reconciliation will allow participating importers to identify the following issues for which complete information is unavailable at the time of entry summary filing:

1. NAFTA
2. Value
3. 9802
4. Classification

Classification issues will be eligible for reconciliation only when such issues have been formally established as the subject of an administrative ruling, protest, petition, or Court action. Reconciliations of classification issues may result in a tariff shift which falls within the pre-identified range of 6-digit HTS provisions. Generally, the exercise of reasonable care should ensure that reconciliations do not result in a tariff shift outside the pre-identified range of 6-digit HTS provisions; however, if special circumstances justify a tariff shift outside the pre-identified range of 6-digit HTS numbers contained in the application, a participant must submit an amended application requesting permission to continue to enter such merchandise in this prototype.

Reconciliations of NAFTA issues must be electronically filed within one year of the date of importation of the oldest entry which is flagged for the Reconciliation. Reconciliation is a vehicle which an importer can use to file post-importation refund claims under 19 U.S.C. 1520(d). Consequently, a failure to file a NAFTA reconciliation within one year of the date of importation will preclude the granting of NAFTA tariff treatment. As such, NAFTA reconciliations are subject to the obliga-

tions under 19 CFR Part 181, Subpart D. NAFTA reconciliations must be supported by importer possession of the documents required under 19 U.S.C. 1520(d) and 19 CFR Part 181.32(b). Presentation of the NAFTA Certificate of Origin to Customs is waived for the purposes of this prototype test, and the filer must retain these documents, which shall be provided to Customs upon request. Filers are reminded that interest shall accrue from the date on which the claim for NAFTA eligibility is made (the date of the Reconciliation) to the date of liquidation or reliquidation of the Reconciliation.

Reconciliations of classification, 9802 and/or value issues must be electronically filed within 15 months of the date of entry summary filing for the oldest entry flagged for the Reconciliation. In order to gain as much experience as possible from this prototype, Customs will work with the participants to determine whether an earlier time frame for filing of the Reconciliation is possible.

Entry summaries may be flagged for reconciliation until the close of the test period. It is important to note that, although the test period has concluded, Reconciliations may be filed and liquidated after the closing date of the test.

Only consumption entries may be filed in the NCAP/P system. Entries subject to reconciliation will be flagged at the header level with an electronic indicator specifying the issue(s) to be reconciled.

The flagging of an entry for reconciliation will serve as the Notice of Intent to File a Reconciliation ("Notice of Intent"), and will permit the liquidation of an entry as to all issues other than those which are flagged for reconciliation. By filing a Notice of Intent, the importer voluntarily requestes and accepts that each issue flagged for reconciliation, and the liability for each issue, is separated from the entry, remains open and is transferred to the Reconciliation. The Notice of Intent opens an obligation for the importer to file the Reconciliation. This obligation also applies to NAFTA reconciliations even if the participant finally concludes it cannot file a valid 520(d) claim, in which instance, the NAFTA reconciliation would be filed as no change.

Importers who choose to participate in this prototype will recognize that the liquidation of the underlying entries pertains only to those issues not identified by the importer on the Notice of Intent. Upon liquidation of the entry, any decision by Customs entering into that liquidation, e.g., classification, may be protested pursuant to 19 U.S.C. 1514. When the outstanding information, e.g., value as determined by the actual costs, is later furnished on the Reconciliation, the Reconciliation will be liquidated upon review by Customs. The liquidation of the Reconciliation may be protested but the protest may only pertain to issues contained in the liquidated Reconciliation, i.e., the protest may not re-visit issues previously liquidated in the entry. Separate Bulletin Notices of Liquidation will be posted for the liquidation of the underlying entries and for the liquidation of the Reconciliation.

Under the statutory mandate of 19 U.S.C. 1484, the importer is responsible for using reasonable care in declaring at entry the proper value, classification and rate of duty applicable to imported merchandise. Inherent in the concept of reconciliation is the fact that, because certain issues are kept open pending filing of the Reconciliation, the information regarding these issues and the resulting liability for the duties, taxes and fees previously asserted by the importer may change when the Reconciliation is filed. Therefore, should any drawback claim or Certificate of Delivery for drawback be filed on import entries which are flagged for reconciliation, Customs will pay accelerated drawback only after the Reconciliation is filed. Upon filing of the Reconciliation, the importer is responsible for indicating whether any underlying entry could be subject to drawback. In the case of a drawback claim and a reconciliation refund against the same underlying entries, the importer is responsible for ensuring that refunds in excess of the duties paid are not filed with Customs and for substantiating how the separate refund requests apply to different merchandise.

A Reconciliation may cover any combination of value, 9802 and classification. Should the issues of value, 9802 and classification be flagged for reconciliation on one entry, one Reconciliation covering all three issues will be filed. NAFTA Reconciliations will not be combined with other issues, because of NAFTA's unique nature, different due dates, and so that Customs may expedite the processing of such refunds. Issues will always be reconciled in their entirety, as opposed to partial Reconciliations. Each Reconciliation should cover no fewer than ten entries. Reconciliation is to be used to group entries together for a common, outstanding issue.

A Reconciliation is treated as a legal entry for purposes of liquidation, reliquidation and protest. For purposes of this prototype, each Reconciliation must be covered by one surety, i.e., two sureties cannot cover the same Reconciliation. The continuous bond obligated on the underlying entries will be used to cover the Reconciliation.

Payments due from the participant as a result of the Reconciliation will be reflected on the participant's monthly statement. Should the Reconciliation result in a refund due the participant, the refund will also appear on the monthly statement and will be used to offset existing or future payment obligations of the participant. Customs will calculate interest upon liquidation of the Reconciliation, and reflect such interest on the monthly statement.

The Reconciliation header will contain the Reconciliation number, the date of Reconciliation filing, the issue(s) being reconciled and the comments. In the comment field, the filer may provide pertinent information, to explain, for example, that the specific value issue within this Reconciliation is an assist declaration.

Following this summary information, there will be two parts of the Reconciliation. The first part will include a list of underlying entry numbers, entry summary dates, and the total duty, taxes and fees (re-

ported by class code) which should have been paid for each of the underlying entries had the complete information been available to the importer at the time of filing of the entry summary. This part of the Reconciliation will also have a field to indicate entries being closed out on the Reconciliation which did not change.

Part two of the Reconciliation will list all of the lines on the flagged entries which changed as a result of the reconciliation. Data elements for each line include entry number, SPI if applicable, HTS, country of origin, quantity if applicable, total value and the total duties, taxes and fees (reported by class code). The "total" figures will represent that which was reported on the underlying entry plus the change pursuant to the Reconciliation. In coordination with the Census Bureau, Customs is analyzing the assignment of a parameter, below which the reporting of reconciled lines (Part 2) would not be required.

The reporting of line items is an interim step being taken for the purposes of gaining experience in the short term. While the Reconciliation will capture line item details for this prototype, Customs is working toward capturing the reconciled information at an aggregate level for future prototypes, which will incorporate compensating controls as a means to ensure that financial safeguards are in place.

The following will serve as an example of the probable structure for the Reconciliation:

Reconciliation #557 *Date: 2/1/97* *Issue: NAFTA*

Part 1:

Entry	*Summary date*	*Total duties*	*Total taxes*	*Total fees [499]*	*No change*
123	10/11/96	$25		$2.89	
234	11/11/96				X
345	12/11/96	$200		$6.10	

Part 2:

Entry	*SPI/HTS*	*Country of Origin*	*Qty [kg]*	*Total Value*	*Total duty*	*Total taxes*	*Total fees [499]*
123	2222	MX	0	$ 0	$ 0		$ 0
123	MX2222	MX	700	$1000	$ 0		$1.90
123	3333	MX	500	$ 250	$ 25		$0.52
123	MX3333	MX	500	$ 250	$ 0		$0.47
345	2222	MX	750	$1500	$150		$3.15
345	MX2222	MX	250	$ 500	$ 0		$0.95
345	3333	MX	200	$ 500	$ 50		$1.05
345	MX3333	MX	200	$ 500	$ 0		$0.95

VII. *Account-Based Import Declaration Process:*

The account-based declaration process is a fully electronic process that will, for NCAP/P participant importers, who must file consumption entries under NCAP/P:

1. Base cargo examination decisions primarily on pre-established account/entry information, minimizing the transaction data that needs to be transmitted to Customs prior to release of cargo. Cargo examinations will also be performed on the basis of selectivity criteria and for random compliance measurement sampling;
2. Permit reporting of detailed entry summary data on a monthly cycle, and
3. Provide for payment of duties, taxes and fees on a monthly statement cycle employing semi-monthly estimated payments.

While various automatic notifications and back-up procedures will also be supported, the basic declaration flow for NCAP/P will be as follows:

1. The application will serve as a pre-filed entry for NCAP/P purposes.
2. Prior to arrival of cargo at the border, the carrier issuing the manifest or an authorized agent will electronically transmit to Customs basic manifest data: coded identification of the carrier; trip details; identification of drivers, the conveyance and other equipment; and an identifying number and the laden quantity for each shipment on the conveyance.
3. Also prior to arrival of the cargo at the border, data pertaining to each individual shipment must be electronically transmitted to Customs. This shipment data will include information generally found on freight bills, plus the NCAP/P Authorization Code assigned to the participating importer by Customs, and identification of the entry filer and the seller and buyer of the merchandise. This shipment data may be transmitted by the carrier issuing the manifest, an authorized agent acting on behalf of the carrier issuing the manifest, or the entry filer (i.e., either the importer of record or the importer of record's customs broker.)
4. Customs will assign an entry number to each shipment from the range of entry numbers provided in advance by each participating entry filer for that purpose. When a truck arrives at the border, shipments for which no physical examination of cargo is required will be released without additional data or documentation. For any shipment aboard that truck selected by Customs for physical examination of cargo, Customs will issue to the entry filer designated in the shipment data an electronic request for additional information. This request may be satisfied by transmission of either partial or complete entry summary and commercial data, as defined by Customs, plus packing data. The commercial data required for cargo examination, whether partial or complete, will be at the detailed item level. Cargo will not be examined until this data is received by Customs.
5. The date of entry will be the date on which merchandise is released by Customs. The release will obligate the continuous bond

identified in the prototype application of the importer whose NCAP/P Authorization Code is present in the shipment data.

6. For each shipment released during a calendar month, the entry filer must electronically transmit complete entry summary data to Customs on or before the filing deadline for that month. The filing deadline for each month will be the 10th calendar day of the following month, or, if the 10th falls on a weekend or holiday, the next business day. Entry summary data transmitted prior to this deadline will be considered provisional and may be replaced by the entry filer anytime before the deadline. All summaries filed on or before the deadline will be considered as filed on the deadline date. Any issues that may be the subject of a future reconciliation must be identified in the entry summary data.

7. For any entry summary selected by Customs for data review, unless complete commercial data was previously transmitted to support a cargo examination, Customs will issue to the entry filer an electronic request for complete commercial data. This request must be satisfied by electronic transmission of a complete set of commercial data, as defined by Customs, plus packing data if specifically requested.

8. By virtue of 19 CFR 101.9, the Customs Service may impose requirements different than those specified in the Customs Regulations; but only to the extent that such different requirements do not affect the collection of revenue. Consequently, in order to permit a different procedure to test the periodic deposit of estimated duties without adversely affecting the collection of revenue, the participant must agree to and abide by the following procedures. Each participating importer account will make semi-monthly preliminary estimated payments through an electronic medium. Preliminary estimated payments will be initiated electronically using ACH credit on the 15th and the last day of the month. If the 15th or the last day of the month falls on a weekend or holiday, the payment must be initiated the next business day. Under the prototype, special electronic payment procedures will be utilized. The preliminary estimated payments will be based upon the following percentages: a) the payment initiated on the 15th will be 75% of the estimated amount due on all releases for the 1–15th of the month, b) the payment initiated on the last day of the month will be 57% of the estimated amount due on all releases from the 16th to the last day of the month. These percentages will be reviewed and may have to be adjusted to maintain revenue neutrality. Payment for the remaining balance will be initiated electronically on the 15th of the following month, and it is this date which Customs and the participants agree will serve as the date of actual deposit of estimated duties and fees for purposes of assessing interest under 19 U.S.C. 1505. Customs will issue two statements each month, one before and one after the monthly filing deadline. Each statement will list each importer account's NCAP/P activity at all locations for the reporting month, and will indicate whether entry summary data has been filed and, if it has, amounts due.

9. Within the period of time prescribed for each issue, the entry filer must transmit an electronic Reconciliation to resolve each is-

sue identified for reconciliation in entry summary data. In general, one Reconciliation will resolve multiple issues for each of the underlying entries.

Cargo will be released and duties, taxes and fees assessed on the basis of data transmitted to the NCAP/P system. For shipments processed in NCAP/P, participants will not be required to provide parallel filing of ACS data or paper documents.

VIII. *Suspension from Prototype:*

If a participant attempts to enter or submit data relating to prohibited merchandise, merchandise subject to quota or antidumping or countervailing duties, or other non-eligible merchandise; or if a participant files non-consumption entries; files erroneous or untimely data; fails to provide requested invoice data or sufficient supporting documentation for Reconciliations; makes late or inadequate payments; fails to exercise reasonable care in the execution of participant obligations; or otherwise fails to follow the procedures outlined herein, and applicable laws and regulations, then the participant may be suspended from the prototype, and/or be subject to penalties.

Any decision suspending participation may be appealed to the Trade Compliance Process Owner, within 15 days of the decision date.

IX. *Regulatory Provisions Suspended:*

Certain provisions of Parts 24, 111, 141, 142, 143 and 159 of the Customs Regulations (19 CFR Parts 24, 111, 141, 142, 143 and 159) will be suspended during this prototype test to allow for monthly filing of entry summary data, periodic payment of duties, taxes and fees, reconciliation for NAFTA, classification, value and 9802 issues, liquidation, billing and remote filing by Customs brokers in ports where they currently do not hold permits.

Absent any specified alternate procedure, the current regulations apply.

X. *Prototype Evaluation:*

Once the importers are selected for NCAP/P, the Joint Prototype Team will, during the initial six months of the test period, evaluate the effectiveness of the automation involved. Subsequent reviews will additionally consist of evaluating the data received from the importers, along with the internal and external process operations of the NCAP/P.

Additional importers may become eligible during the prototype period, using the eligibility requirements cited above, thereby increasing the number of companies involved in the NCAP/P. The evaluation of the prototype as it pertains to these importers may occur separately from that which is done on the original participants. Regardless, the intention of the evaluations is to enhance operational procedures and to develop the detailed data requirements that are needed for NCAP.

Note that the fact of participation in the NCAP/P is not confidential information. Lists of participants will be made available to the public by means of the Customs Electronic Bulletin Board and the Customs

Administrative Message System, and upon written request. We stress that all interested parties are invited to comment on the design, conduct, and evaluation of NCAP/P at any time during prototype.

Upon conclusion of the prototype the final results will be published in the Federal Register and the CUSTOMS BULLETIN as required by § 101.9(b), Customs Regulations and reported to Congress.

Dated: March 21, 1997.

AUDREY ADAMS,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, March 27, 1997 (62 FR 14731)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 25, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MARVIN M. AMERNICK,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF COMPUTER MOUSE PAD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification a computer mouse pad. The article is a mouse pad composed of a natural cellular rubber covered on one side with a knit fabric material. A transparent plastic cover, which provides the working surface for the mouse, is glued along one side of the mouse pad.

DATE: Comments must be received on or before May 9, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW (Franklin Court), Washington D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Deann Schaffer, Textiles Branch (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a computer mouse pad. Customs invites comments on the correctness of the proposed revocation.

In New York Ruling Letter (NY) A88133, dated October 10, 1996 (set forth as "Attachment A"), a computer mouse pad was held to be classifiable under subheading 4016.99.3500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as an other article of vulcanized rubber, other than hard rubber: other: of natural rubber, other.

It is now Customs position that the computer mouse pad is properly classified under subheading 4016.10.0000, HTSUSA, which provides for other articles of vulcanized rubber other than hard rubber: of cellular rubber.

Customs intends to revoke NY A88133 and rule that the proper classification of the article described above is under subheading 4016.10.0000, HTSUSA. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 960129, revoking NY A88133, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 25, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 10, 1996.

CLA–2–39:RR:NC:2:221 A88133
Category: Classification
Tariff No. 4016.99.3500

MR. CHRISTOPHER L. THAYER
HALLMARK CARDS, INC.
26th and Gillham Road No. 376
Kansas, MI 64141

Re: The tariff classification of a computer mouse pad from Taiwan.

DEAR MR. THAYER:

In your letter dated September 30, 1996, you requested a tariff classification ruling.

The base of the mouse pad is composed of a natural cellular rubber covered on one side with a knit fabric material. The rubber/fabric combination weighs over 1,500 grams per

square meter and contains not more than 50 percent by weight of the textile material. A transparent plastic cover, which provides the working surface for the mouse, is glued along one edge of the mouse pad. This cover can be lifted so that pictures or cards can be placed under it. The mouse pad is approximately 11 inches by 8½ inches. The corners are rounded. The weight and value of the rubber base far exceed the weight and value of the plastic cover. As you requested, your sample is being returned.

The applicable subheading for the mouse pad will be 4016.99.3500, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of vulcanized rubber, other than hard rubber: other: of natural rubber, other. The rate of duty will be 2.5 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Joan Mazzola at 212–466–5580.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 960129 DHS
Category: Classification
Tariff No. 4016.10.0000

CHRISTOPHER L. THAYER, ESQ.
HALLMARK CARDS, INC.
Kansas City, MI 64141

Re: Tariff classification of a computer mouse pad from Taiwan.

DEAR MR. THAYER:

This is in response to a request for reconsideration from the Area Director of New York/Newark, dated December 26, 1996, requesting that we reconsider New York Ruling Letter (NY) A88133, dated October 10, 1996. We have reconsidered this ruling and determined that it is incorrect.

Facts:

The merchandise is a mouse pad composed of a natural cellular rubber covered on one side with a knit fabric material. The rubber/fabric combination weighs over 1,500 grams per square meter and contains not more than 50 percent by weight of the textile material. A transparent plastic cover, which provides the working surface for the mouse, is glued along one side of the mouse pad. This cover can be lifted so that pictures or cards can be placed under it. The mouse pad is approximately 11 inches by 8½ inches. The corners are rounded. The weight and value of the rubber base far exceed the weight and value of the plastic cover.

Issue:

What is the proper classification of the merchandise at issue?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the

remaining GRI's may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

Because proper classification cannot be determined by applying GRI 1 alone, reference to the subsequent GRI's is necessary. GRI 2 contains two clauses, the second of which pertains to mixtures or combinations of a material or substance, and goods consisting of two or more materials or substances. GRI 2(b) further provides: "The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3." Because the subject merchandise consists of cellular rubber, nylon fabric, and the thin plastic cover, the principles of GRI 3 must be applied to determine the proper classification of the subject article.

GRI 3(a) states that:

> The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

In this case, the headings under which the cellular rubber, the fabric and the plastic covering components are classifiable are equally specific in relation to one another and we cannot resolve this classification issue on the basis of GRI 3(a).

GRI 3(b) provides that:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The factor that determines the essential character of an article varies amongst different types of articles. It may be the nature of the material or component, its weight, value, bulk or quantity, or its role in relation to the use of the goods.

In New York Ruling Letter (NY) A88133, Customs determined that the mouse pad was classifiable under subheading 4016.99.3500, HTSUSA, which provides for other articles of vulcanized rubber, other than hard rubber: other: of natural rubber, other. This determination was based upon the application of GRI 3(b).

With respect to the article under consideration, the Area Director was correct in concluding that the cellular rubber imparts the essential character. This is apparent from the fact that the cellular rubber provides the structure, shape, greater value and weight of the mouse pad. In this instance, the mouse pad is more appropriately classifiable under subheading 4016.10.0000, HTSUSA, which specifically provides for cellular rubber instead of the less specific subheading 4016.99.3500, HTSUSA.

Holding:

The applicable subheading for the mouse pad is 4016.10.0000, HTSUSA, which provides for "[o]ther articles of vulcanized rubber other than hard rubber: of cellular rubber." The applicable rate of duty is 1.7 percent *ad valorem*. NY A88133 is, hereby, revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SLEEPWEAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of sleepwear. Comments are invited on the correctness of the proposed ruling.

EFFECTIVE DATE: Comments must be received on or before May 9, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue NW, (Franklin Court) Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Branch (202) 482–7048.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of sleepwear.

In New York Ruling Letter (NY) A80370, dated March 13, 1996, Style 75042T, a pullover garment was classified in subheading 6110.20.2065, of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's cotton knitted pullovers other, other. In NY A80370, Styles 85012T and 95002T, men's pull-on pants and shorts, were classified in subheading 6103.42.1020 and 6103.42.1050, HTSUSA, respectively. NY A80370 is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that in light of the overall construction of the subject garments which is associated with sleepwear, the advertising and marketing data submitted to indicate that the

garments are intended to be used as sleepwear, that the garments should be classified as sleepwear. Therefore, Customs intends to revoke NY A80370 to reflect the proper classification of Styles 85012T, 95002T, and Style 75042T in subheading 6107.21.0010, HTSUSA, as men's knitted pajamas, of cotton, if either Styles 85012T or 95002T are imported in equal quantities and sizes with Style 75042T. If the bottoms are imported separately or without an equal number of matching tops, the garments are classified in 6107.91.0030, HTSUSA, which provides for men's other knitted sleepwear, of cotton. Proposed HQ 959084 modifying NY A80370 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 9, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 13, 1996.

CLA–2–61:RR:NC:WA:N5:356 A80370
Category: Classification
Tariff No. 6110.20.2065,
6103.42.1020, and 6103.42.1050

MR. ALLAN H. KAMNITZ
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
Sixty-Seven Broad Street
New York NY 10004

Re: The tariff classification of men's knit garments from Peru.

DEAR MR. KAMNITZ:

In your letter dated February 12, 1996, you requested a tariff classification ruling on behalf of Cypress Apparel Group.

Style 75042T is a man's pullover garment constructed from 100 percent cotton, finely knit jersey fabric. The garment features a rib knit crew neckline; a v-shaped insert at the front neckline below the neckband; short, hemmed sleeves; an embroidered logo on the left chest; a triangular sweat patch sewn to the inner back neckline; and a hemmed bottom with side slits.

Style 85012T is a pair of men's pants constructed from 100 percent cotton, finely knit jersey fabric. The garment features an exposed jacquard elastic waistband; a one button fly front opening; two side seam pockets; and hemmed leg openings. The jacquard waistband contains the words "Tommy Hilfiger". A "Tommy Hilfiger" woven fabric label is sewn to the center front waistband.

Style 95002T is a pair of men's shorts constructed from 100 percent cotton, finely knit jersey fabric. The garment features an exposed jacquard elastic waistband; a one button fly front opening; two side seam pockets; and hemmed leg openings with side slits. The jac-

quard waistband contains the words "Tommy Hilfiger". A "Tommy Hilfiger" woven fabric label is sewn to the center front waistband.

As requested, your samples will be returned.

The applicable subheading for Style 75042T will be 6110.20.2065, Harmonized Tariff Schedule of the United States (HTS), which provides for: sweaters, pullovers, sweatshirts waistcoats (vests) and similar articles, knitted or crocheted: of cotton: other: other: other: men's or boys'. The duty rate is 19.9 percent *ad valorem*.

The applicable subheading for Style 85012T will be 6103.42.1020, Harmonized Tariff Schedule of the United States (HTS), which provides for: men's or boys's * * * trousers, knitted or crocheted: of cotton: trousers: men's. The duty rate is 16.9 percent *ad valorem*.

The applicable subheading for Style 95002T will be 6103.42.1050, Harmonized Tariff Schedule of the United States (HTS), which provides for men's or boys's * * * shorts (other than swimwear), knitted or crocheted: of cotton: shorts: men's. The duty rate is 16.9 percent *ad valorem*.

Style 75042T falls within textile category designation 338. Style 85012T and Style 95002T fall within textile category designation 347. Based upon international textile trade agreements, products of Peru are subject to visa requirements and quota restraints.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise maybe affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the, U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding this ruling, contact National Import Specialist Mary Ryan at 212–466–5677.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 959084 CAB
Category: Classification
Tariff No. 6107.21.0010 and 6107.91.0030

ALLAN H. KAMNITZ, ESQ.
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
Sixty-seven Broad Street
New York, NY 10004

Re: Reconsideration of NY A80370, dated March 13, 1996; sleepwear vs. outerwear; Heading 6107; Heading 6103; Heading 6110.

DEAR MR. KAMNITZ:

This is in response to your inquiry of March 25, 1996, requesting reconsideration of New York Ruling Letter (NY) A80370, dated March 13, 1996, regarding the tariff classification certain men's garments pursuant to the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Your request is on behalf of Cypress Apparel Group. Samples were submitted for examination and will be returned to you under separate cover.

Facts:

The garments at issue are comprised of Styles 75042T, 85012T, and 95002T which are comprised of identical fabric. Style 75042T is a man's pullover garment constructed of 100

percent cotton knit jersey material. The garment contains a rib knit crew neckline, a V-shaped insert at the front neckline, short sleeves, an embroidered logo located on the left chest area, a triangular sweat patch at the back neckline, and a hemmed bottom with side slits. Style 85012T is a pair of men's pull-on pants made of 100 percent cotton knit jersey fabric. The pants contain an exposed jacquard elastic waistband, a one button fly front opening, two side seam pockets, and hemmed leg openings. The jacquard waistband depicts the words "Tommy Hilfiger". Style 95002T is a pair of men's pull-on shorts made of 100 percent cotton knit jersey fabric. The shorts contain an exposed jacquard elastic waistband, a one button fly front opening, two side seam pockets, and hemmed leg opening with side slits. The jacquard waistband contains the words "Tommy Hilfiger".

In NY A80370 Style 75042T was classified in subheading 6110.20.2065, HTSUSA, which is the provision for men's cotton knitted pullovers, other, other. In NY A80370 Style 85012T was classified in subheading 6103.42.1020, HTSUSA, which provides for men's cotton knitted trousers and Style 95002T was classified in subheading 6103.42.1050, which is the provision for men's cotton knitted shorts.

Issue:

Whether the subject merchandise is classifiable as sleepwear under Heading 6107, HTSUSA, or as outerwear garments under Headings 6110 and 6103, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 6107, HTSUSA, provides for, among other things, men's knitted nightshirts, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two piece garments worn for sleeping. One piece garments used for sleeping may be classifiable as pajamas, but such garments must cover the entire torso. Other one piece garments used for sleeping are not classifiable as pajamas, instead, they fit into a residual provision within Heading 6107, HTSUSA, for similar articles. Garments classified in this residual provision include sleep shorts and sleep pants.

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in several court cases that dealt with sleepwear. In *Mast Industries Inc. v. United States*, 9 CIT 549, 552 (1985), *aff'd* 786 F.2d 144 (CAFC, April 1, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under Heading 6204, HTSUSA, or as "underwear" under Heading 6208, HTSUSA. The court stated the following, in pertinent part:

> [P]laintiffs preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be. Plaintiff also established that it is considered an underwear resource, that the Hong Kong factory which manufactured its merchandise does not produce outerwear * * *. Further, evidence was provided that plaintiff's merchandise is marketed as underwear. While advertisements also are not dispositive as to correct classification under the HTSUS, they are probative of the way that the importer viewed the merchandise and of the market the importer was trying to reach.

You assert that the subject garments are sleepwear and should be classified as sleepwear under Heading 6107, HTSUSA. You maintain that the overall construction of the garments, including the loose-fit and the lightweight fabric construction make them particularly comfortable and suitable for sleeping. You have submitted pictures depicting the

subject merchandise in the sleepwear department in several different retail stores. You emphasize the subject garments will be purchased, marketed, and sold as pajamas or sleepwear, and that at retail a display hangtag will be affixed to the garment indicating that the garments are part of the Tommy Hilfiger sleepwear collection. In support of your position, you refer to Headquarters Ruling Letter (HQ), 957862, dated December 21, 1995 and HQ 956755, dated November 10, 1994, for the proposition that in determining whether garments are designed, manufactured and used sleepwear, Customs would look to such factors as the physical characteristics of the garment, environment of the sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise. In both of the cited cases, Customs determined that lightweight loose-fitting garments coupled with design, marketing, and purchasing data which supported classification as sleepwear were classifiable as sleepwear.

In *Mast, supra,* the court noted that, "most consumers tend to purchase and use a garment in the manner in which it is marketed." In light of the cited line of court cases, in addition to the overall construction of the garments which is associated with sleepwear, the advertising and marketing data submitted which indicate that the garments are intended to be used as sleepwear, Customs agrees that the garments will be principally used as sleepwear. Thus, the subject garments are classifiable under Heading 6107, HTSUSA.

You state in your submission that retail stores intend to offer the garments for sale either as a pajamas ensemble or with just the pajama bottoms being sold. Thus, in some instances, an equal number of tops and matching bottoms are sold and in other situations, retailers are buying more bottoms than tops. It is important to note that if the matching tops and bottoms are imported together in equal numbers, they will be classified as pajamas under Heading 6107, HTSUSA. If however, unequal numbers of tops and bottoms are imported together, the odd tops or bottoms without a matching piece will be classified in the residual subheading under Heading 6107, HTSUSA, for similar articles.

Holding:

Based on the foregoing, if Style 75042T is imported in equal quantities and sizes with either Style 35012T or Style 95002T, they are classified as pajamas in subheading 6107.21.0010, HTSUSA, which is the provision men's knitted pajamas, of cotton. The applicable rate of duty is 9.3 percent *ad valorem* and the textile restraint category is 351. If the bottoms are imported separately or without matching tops of corresponding quantities and sizes, the garments are classified in subheading 6107.91.0030, which provides men's other knitted sleepwear. The applicable rate of duty is 9.1 percent *ad valorem* and the textile restraint category is 351. Customs is assuming these garments are subject to the Column 1 General rates of duty.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels),* an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

RELATING TO THE PROPOSED MODIFICATION OF A RULING LETTER INVOLVING THE TARIFF CLASSIFICATION AND COUNTRY OR ORIGIN MARKING OF A SUNFLOWER SEED GROWING KIT

ACTION: Notice of proposed modification of past ruling letter; solicitation of comments.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification and country of origin marking of a sunflower seed growing kit.

DATES: Comments must be received on or before May 9, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Keith B. Rudich, Special Classification and Marking Branch, (202) 482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification and country of origin marking of a sunflower growing kit imported into the United States from Canada.

Headquarters Ruling Letter (HRL) 735372 dated March 16, 1995 (Attachment A to this document) involved the country of origin marking requirements applicable to a sunflower growing kit imported from Canada. The kit consisted of organic growing mix of Canadian origin, sunflower seeds of Japanese origin, and a terra cotta pot and saucer of German origin. The NAFTA marking rules set forth in Part 102, Customs Regulations (19 CFR Part 102), were used to determine the country or countries of origin of the set. For purposes of determining whether the applicable tariff shift rule in 19 CFR 102.20 would render an origin determination, it was necessary to ascertain the classification of the set. Customs ruled in HRL 735372 that, as no single component

comprised the essential character of the set, it was properly classifiable pursuant to General Rule of Interpretation (GRI) 3(c), HTSUS, under the tariff provision for the pot and saucer (subheading 6914.90.80, HTSUS; the heading occurring last among those meriting equal consideration).

However, in HRL 953946 dated August 30, 1993 (Attachment B to this document), Customs held that for seed growing kits, including a sunflower seed growing kit, the essential character of the growing kit was imparted by the seeds. As a result, the kit was classified pursuant to GRI 3(b) in the tariff provision for the seeds (subheading 1206.00.00, HTSUS).

After further consideration, and in order to achieve uniformity on this issue, Customs is proposing to modify HRL 735372 to conform with the holding in HRL 953946 that the sunflower seeds impart the essential character to the sunflower seed growing kit. Although this change in the classification of the set in HRL 735372 will result in the application of a different tariff shift rule in 19 CFR 102.20 for country of origin purposes, Customs notes that the conclusion reached in HRL 735372 on the origin of the kit will not change.

Therefore, Customs proposes to modify HQ 735372 (March 16, 1995). Before taking this action, consideration will be given to any written comments timely received. The proposed ruling HQ 559268 modifying the aforementioned determination is set forth in Attachment C to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations, (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 25, 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 16, 1995.
MAR–2–05 CO:R:C:S 735372 KR
Category: Marking

ED BAKER
AN. DERINGER, INC.
30 West Service Road
Champlain, NY 12919

Re: Country of origin marking of imported sunflower growing kit; Article 509, NAFTA, 19 CFR Part 102.

DEAR MR. BAKER:

This is in response to your letter dated September 24, 1993, and a telephone conversation on July 27, 1994, on behalf of Seracon Products, requesting a country of origin ruling regarding marking a sunflower growing kit.

Facts:

You state that Seracon Products intends to import a sunflower growing kit into the U.S. The pieces are separate and are packaged into a reusable canister The canister contains sunflower seeds, a terra cotta pot and saucer, a bag of soilless organic grow mix. The canister and grow mix are products of Canada. The sunflower seeds are products of Japan. The terra cotta pot and saucer are products of Germany. The top of the canister has an adhesive label which is printed:

PACKAGED IN CANADA
REUSABLE CANISTER AND GROWING MIX
PRODUCTS OF CANADA

SUNFLOWER SEEDS—PRODUCT OF JAPAN

TERRA COTTA POT AND SAUCER
PRODUCT OF GERMANY

The canister has a label encircling it which is printed with:

MADE BY/FRABRIQUE PAR
SERACON PRODUCTS
MONTREAL, CANADA

However, in a telephone conversation on July 27, 1994, you stated that you were going to remove the "MONTREAL, CANADA" from the canister label, and only the top adhesive label would have any geographical reference.

Issue:

Whether the adhesive label is an adequate country of origin marking for the sunflower growing kit.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlander & Co.*, 27 C.C.P.A. 297 at 302; C.A.D. 104 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of the marking laws and regulations. The case of *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940), provides that an article used in manufacture which results in an article having a name, character or use differing from that of the constituent article will be considered substantially transformed. In such circumstances the U.S. manufacturer is the ultimate purchaser. The imported article is excepted from individual marking and only the outermost container is required to be marked. *See* 19 CFR 134.35.

The country of origin marking requirements for goods of a NAFTA country are determined in accordance with Annex 311 of the North American Free Trade Agreement, as implemented under the North American Free Trade Implementation Act ("NAFTA") Pub. L. 103–182, 107 Stat. 437 (December 8, 1993)); implemented by T.D. 94–4, NAFTA Interim Regulations (59 Fed. Reg. 110 (January 3, 1994))(to be codified at 19 CFR Parts 12, 102 and 134) as amended (59 Fed. Reg. 5082 (February 3, 1994) and T.D. 94–1 (59 Fed. Reg. 69460, December 30, 1993)). These interim amendments took effect on January 1, 1994, to coincide with the effective date of the NAFTA. The marking rules used for determining whether a good is a good of a NAFTA country are contained in T.D. 94–4 (adding a new Part 102, Customs Regulations). The marking requirements for these goods are set forth in T.D. 94–1 (interim amendments to various provisions of Part 134, Customs Regulations).

Section 134.1(b) of the interim regulations, defines "country of origin" as:

> the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the "country of origin" within this part; *however, for a good of a NAFTA country, the NAFTA marking rules will determine the country of origin.* (Emphasis added).

Section 134.1(j), of the interim regulations, provides that the "NAFTA marking rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) of the interim regulations, defines a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico, or the U.S. as determined under the NAFTA marking rules. Section 134.45(a)(2) of the interim regulations, provides that a "good of a NAFTA country" may be marked with the name of the country of origin in English, French or Spanish.

Part 102 of the interim regulations, sets forth the NAFTA marking rules for purposes of determining whether a good is a good of a NAFTA country for marking purposes. Section 102.11 of the interim regulations, sets forth the required hierarchy for determining country of origin for marking purposes. Section 102.11(a) of the interim regulations states that "[t]he country of origin of a good is the country in which:

> (1) The good is wholly obtained or produced;
> (2) The good is produced exclusively from domestic materials; or
> (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied."

In this case, the applicable rule is 19 CFR § 102.11(a)(3) of the interim regulations. "Foreign Material" is defined in section 102.1(e) of the interim regulations as "a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced." In order to determine whether Canada is the country of origin, we must look at those materials whose country of origin is other than Canada.

When imported individually, the sunflower seeds are classified under HTSUS 1206.00 and the terra cotta pot and saucer are classified under HTSUS 6914.90.80. However, in the condition as imported in this case, i.e., as a sunflower growing kit, the terra cotta pot and saucer and the sunflower seeds are classified as a "set" pursuant to General Rules of Interpretation ("GRI") 3. Under the circumstances presented, the kit would be classified under the tariff provision for the pot and saucer, *i.e.*, subheading 6914.90.80, HTSUS, as a result of the application of GRI 3(c).

Thus, in this case, the specific tariff rule applicable to the kit is set forth in § 102.20(m), Section XIII: Chapters 68 through 70, which states: "A change to heading 6901 through 6914 from any other chapter."

However, 19 CFR § 102.17(c) states that a foreign material shall not be considered to have undergone the applicable change in tariff classification set out in 19 CFR § 102.11(a) and § 102.20 by reason of a simple packaging operation. Thus, although it appears that the sunflower seeds meet the tariff shift rule specified for the kit, in this case, the change in tariff classification is not recognized because it occurs merely as a result of a simple packaging operation. 19 CFR § 102.17(c).

Therefore, we find that origin of the kit cannot be determined pursuant to section 102.11(a)(3). Moreover, section 102.11(b) is not applicable since the good (kit) is classified as a set. However, section 102.11(c) provides, *inter alia*, that for a good which is classified as a set under the HTSUS, the country of origin of such a good is the country or countries of origin of all materials that merit equal consideration for determining the essential character of the good. Since we find that each of the components of the kit (*i.e.*, the seeds, pot and saucer) merits equal consideration for determining the essential character of the kit, the country of origin of the kit is the country of origin of each of these components. Inasmuch as the adhesive label lists the individual country of origin of each component, it is an acceptable country of origin marking under section 1304.

However, it should be noted that the canister qualifies as a "usual container" pursuant to 19 CFR § 134.22(d)(1), and as a usual container from a NAFTA country, even though reusable, the canister itself is excepted from country of origin marking under 19 CFR § 134.22(d)(2). Therefore, the words appearing on the adhesive label indicating the country of origin of the reusable canister, although acceptable, are not required.

The first line of the adhesive label states that the sunflower growing kit is "PACKAGED IN CANADA". The marking of where the packaging occurs is not required, and could be removed. However, since it appears on the sample provided, it must satisfy the country of origin marking regulations. Section 134.46, Customs Regulations (19 CFR § 134.46), requires that when the name of any city or locality in the U.S., or the name of any foreign country or locality other than the name of the country or locality in which the article was manufactured or produced, appears on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. Customs has ruled that in order to satisfy the close proximity requirement, the country of origin marking must appear on the same side(s) or surface(s) in which the name of the locality other than the country of origin appears. HQ 708994 (April 24, 1978). The purpose of 19 CFR § 134.46 is to prevent the possibility of misleading or deceiving the ultimate purchaser as to the origin of the imported article. In this situation, the "PACKAGED IN CANADA" appears in larger print than the other country of origin designations. We find this to be a violation of 19 CFR § 134.46. Since "PACKAGED IN CANADA" is not required to appear on the product, it must either be removed, or the print size must be reduced so as to more closely match the print size of the country of origin designations of the contents.

Holding:

The adhesive label listing the individual countries of origin of the contents of the sunflower growing kit is an acceptable method of country of origin marking. However, the marking on the front label "MONTREAL, CANADA" must be removed, and the words "PACKAGED IN CANADA" printed on the adhesive label must be either removed or reduced in size so that these words are more closely matched to the print size of the country of origin designations appearing on the

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 30, 1993.

CLA–2 CO:R:C:F 953946 ALS
Category: Classification
Tariff No. 0601.10.6000,
0601.10.9080, and 1206.00.0040

MR. ED BAKER
A.N. DERINGER, INC.
30 West Service Road
Champlain, NY 12919

Re: Seed and bulb kits.

DEAR MR. BAKER:

This is in reference to your ruling request of April 1, 1993, concerning "Easy-Gro Bulb Kits" and "Easy-Gro Dwarf Sunflower Kits" assembled in Canada from components originating in Canada and other countries.

Facts:

The articles under consideration are kits composed of a 5 inch terra cotta pot and saucer; a bag of growing mix containing peat moss, vermiculite, perlite, calcitic lime, dolomite lime, nitrogen phosphorous, potassium, trace elements and a wetting agent; amaryllis, paperwhite narcissus, white calla lily bulbs or sunflower seeds; straw fill and a fiberboard canister with a lid and label. The bulbs and seeds are not in growth or flower. The growing mix, straw fill and packaging are of Canadian origin. The pot and saucer are from Germany. The amaryllis bulbs are from Holland, the Narcissus bulbs are from Israel, and the Calla Lily bulbs are from the U.S. The sunflower seeds are from Japan. The non-Canadian components are assembled, in Canada, with products of Canadian origin into kits. The value and origin of items common to each kit are:

5 inch terra cotta pot and saucer	– Cdn	$ .60	– Germany
Growing mix	–	.15	– Canada
Straw fill	–	.15	– Canada
Fiberboard Canister/Lid/Labelling	–	1.83	– Canada
Assembly Labor	–	.50	– Canada

The kits also contain one type of bulb or seed, as follows:

An Amaryllis bulb valued at Cdn $4.05 each,
Narcissus bulbs valued at Cdn $1.96 (4 in each kit @ Cdn $.49 each),
A Calla Lily bulb valued at Cdn $1.35 each, or
A Dwarf Sunflower Seed at Cdn $.41

These prices are based on spring 1993 purchases by the Canadian supplier of the kits and will be good for shipments to the United States from September 1993 through March 1994.

Issue:

What is the classification of the subject kits and are they eligible for preferential treatment under the U.S.—Canada Free-Trade Agreement (CFTA)?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the heading and legal notes do not otherwise require, the remaining GRI's are applied taken in order.

In considering the headings eligible for classification of these goods, we noted that the components of the kits are classifiable in 3 different headings of the HTSUSA. For purposes of classification, the packaging and straw fill were not considered. There is no specific heading that refers to all the components of the kits. Since each of the headings refer to only a part of the kit, we referred to GRI 3 which, pursuant to GRI 2, provides that goods classifiable under 2 or more headings shall be classified according to the provisions of GRI 3. Al-

though GRI 3(a) provides that the heading with the most specific description shall be preferred to other headings, when 2 or more headings refer to a part only of the materials or substances contained in mixed or composite goods, the headings are to be considered as equally specific. We found that to be the case with this article so it could not be classified under that GRI.

We next referred to GRI 3(b) which covers mixtures, composite goods consisting of different materials or made up of different components and goods put up in sets for retail sale which cannot be classified by reference to GRI 3(a). In considering whether the subject articles are sets for retail sale in accord with GRI 3(b), we evaluated the articles against the specified requirements which a product must meet to qualify for classification thereunder. The articles must:

(a) consist of at least 2 different articles which are *prima facie* classifiable in different headings;
(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
(c) be put up in a manner suitable for retail sale directly to users without repacking.

We believe that the articles under consideration meet all those requirements. The individual components of the kits are clearly packaged to be sold at retail, they are composed of at least 2 different articles classifiable in different headings, and the contents of each kit are designed to permit an interested person to grow a flower.

In considering which of the materials give the kits their essential character we noted that the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. We believe that the bulbs or seeds form the essential character of the kits because without them the kits would serve no purpose.

We next considered the eligibility of the kits for preferential treatment under the CFTA. General Note 3(c)(vii) the HTSUSA provides the rules which determine what products imported into the United States from Canada are entitled to special duty treatment under the CFTA. Eligible goods must be goods "originating" in Canada, as stated in General Note 3(c)(vii)(A), HTSUSA.

Pursuant to General Note 3(c)(vii)(B), HTSUSA, goods imported into the Customs territory of the United States are eligible for treatment as *"goods originating in the territory of Canada"* only if—

(1) they are goods wholly obtained or produced in the territory of Canada and/or the United States,
(2) they have been transformed in the territory of Canada and/or the United States, so as to be subject—
(I) to a change in tariff classification as described in the rules of subdivision (c)(vii)(R) of this note, or
(II) to such other requirements subdivision (c)(vii)(R) of this note may provide when no change in tariff classification occurs, and they meet the other conditions set out in subdivisions (c)(vii)(F), (G), (H),) (I), (J) and (R) of this note.

Since the nature of goods imported into Canada and assembled with various Canadian products to form the subject kits is not altered in any way and the classification of such individual components is not changed, subdivision (c)(vii)(B)(2)(I) is not applicable hereto. We, however, believe that paragraph (II) of the subdivision may apply. After concluding that most of the references in paragraph (II) were inapplicable, we considered the applicability of subdivision 3(c)(vii)(H). That provision provides:

(H) Notwithstanding subdivision (c)(vii)(G), goods described in that paragraph shall be considered to have been transformed in the territory of Canada and be treated as goods originating in the territory of Canada if—
(1) the value of materials originating in the territory of Canada and/or the United States that are used or consumed in the production of the goods plus the direct cost of assembling the goods in the territory of Canada and/or the United States constitute not less than 50 percent of the value of the goods when exported to the territory of the United States, and
(2) the goods have not subsequent to assembly undergone processing or further assembly in a third country * * *.

In order to determine whether the subject kits meet the requirements of subdivision 3(c)(vii)(H), we considered the information provided by the requester as to the origin and value of each component of the kits. In regard to the bulb kits we concluded:

1. The Amaryllis bulb kit is not eligible for CFTA treatment since 63.9 percent of the value relates to components whose origin is other than Canada or the U.S.
2. The White Calla Lily bulb kit is eligible for CFTA treatment since 87.4 percent of its value relates to components whose origin is either Canada or the U.S.
3. The Paperwhite Narcissus bulb kit is eligible for CFTA treatment. Based on figures which will be steady until March 1994, the Canadian component of the kit (there is no U.S. component) forms 50.67 percent of the value. (Fluctuation of the value of any of the components of the kit, will make it necessary to reevaluate the conclusion as to CFTA eligibility)
4. The Sunflower seed kit is eligible for CFTA treatment since 72.3 percent of its value relates to components whose origin is either Canada or U.S.

Holding:

Kits composed of a terra cotta pot and saucer, a bag of growing mix, straw fill, and a fiberboard canister and which contain an amaryllis or calla lily bulb, not in growth or flower, are classifiable in subheading 0601.10.9080, HTSUSA. They are subject to a general rate of duty of 5.5 percent *ad valorem*. Such kits containing a narcissus bulb, not in growth or flower, are classifiable in subheading 0601.10.6000, HTSUSA, and are subject to a general rate of duty of $2.10 per 1000. Such kits containing sunflower seeds are classifiable in subheading 1206.00.0040, HTSUSA, and are subject to a free general rate of duty.

The above kits, which are the product of Canada, may be eligible, in accordance with General Note 3(c)(vii)(B), HTSUSA, for a reduced rate of duty upon compliance with the provisions of the United States—Canada Free-Trade Agreement and section 10.301 et seq., Customs Regulations (19 CFR 10.301 et seq.).

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–2–05 RR:TC:SM 559268 KR
Category: Marking

ED BAKER
A.N. DERINGER, INC.
30 West Service Road
Champlain, NY 12919

Re: Modification of prior ruling HQ 732372, concerning the country of origin marking of imported sunflower growing kit; Article 509, NAFTA, 19 CFR Part 102.

DEAR DIRECTOR:

This is a modification of a prior ruling, HQ 732372 March 16, 1995), involving a country of origin ruling regarding the country of origin marking of a sunflower growing kit.

Facts:

Seracon Products intends to import a sunflower growing kit into the U.S. The pieces are separate and are packaged into a cardboard canister. The canister contains sunflower seeds, a terra cotta pot and saucer, and a bag of soilless organic growing mix. The canister and growing mix are products of Canada. The sunflower seeds are products of Japan. The terra cotta pot and saucer are products of Germany. The top of the canister has an adhesive label on which there is printed:

PACKAGED IN CANADA
REUSABLE CANISTER AND GROWING MIX
PRODUCTS OF CANADA

SUNFLOWER SEEDS—PRODUCT OF JAPAN

TERRA COTTA POT AND SAUCER
PRODUCT OF GERMANY

The canister has a label encircling it on which there is printed:

MADE BY/FRABRIQUE PAR
SERACON PRODUCTS
MONTREAL, CANADA

However, in a telephone conversation on July 27, 1994, the importer stated that they were going to remove the "MONTREAL, CANADA" from the canister label, and only the top adhesive label would have any geographical reference.

Issue:

Whether the adhesive label is an adequate country of origin marking for the sunflower growing kit.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlander & Co.*, 27 C.C.P.A. 297 at 302; C.A.D. 104 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. 1304.

Section 134.1(b) of the regulations, defines "country of origin" as:

> the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the "country of origin" within this part; *however, for a good of a NAFTA country, the NAFTA marking rules will determine the country of origin.* (Emphasis added).

Section 134.1(j), of the regulations, provides that the "NAFTA marking rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) of the regulations, defines a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico, or the U.S. as determined under the NAFTA marking rules.

Section 134.1(d), provides that:

> The "ultimate purchaser" is generally the last person in the United States who will receive the article in the form in which it was imported; however, for a good of a NAFTA country, the "ultimate purchaser" is the last person in the United States who purchases the good in the form in which it was imported.

Part 102 of the regulations sets forth the "NAFTA Marking Rules" for purposes of determining whether a good is a good of a NAFTA country for marking purposes. Section 102.11 of the regulations, sets forth the required hierarchy for determining country of origin for marking purposes. Section 102.11(a) of the regulations states that "[t]he country of origin of a good is the country in which:

(1) The good is wholly obtained or produced;
(2) The good is produced exclusively from domestic materials; or

(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied."

Since the sunflower growing kit is neither wholly obtained or produced in a single country nor produced exclusively from domestic materials, § 102.11(a)(1) and (2) are not applicable for purposes of determining whether the sunflower growing kit is a good of Canada. Therefore, it must be determined whether pursuant to § 102.11(a)(3), the foreign materials incorporated into the sunflower growing kit meet the specific tariff rule of § 102.20. "Foreign Material" is defined in section 102.1(e) as "a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced." Thus, we must look at those materials whose country of origin is other than Canada. The sunflower growing kit has four components; the growing mix, the sunflower seeds, the terra cotta pot and saucer. The growing mix is a product of Canada; the sunflower seeds are products of Japan; the terra cotta pot and saucer are from Germany.

To ascertain the applicable rule in 19 CFR § 102.20, we must first determine the classification of the set. When imported separately, the sunflower seeds are classified under heading 1206, HTSUS, the terra cotta pot and saucer are classified under heading 6914, HTSUS, and the growing mix is classified under heading 3501, HTSUS. The items in this set are *prima facie* classifiable in two or more headings. Therefore, classification under GRI 1 fails, and we must apply the other GRIs.

GRI 3(a) states that if a product is classifiable in two or more headings by application of GRI 2(1)), or for any other reason, then the

> heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to * * * part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

GRI 3(b)) provides that "goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character."

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Cooperation Council's official interpretation of the HTSUS. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. To determine what is a "set put up for retail sale", EN X to GRI 3(1)), page 4, states that:

> [f]or the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The subject merchandise is a set, because: the items in it are provided for in headings 1206 and 6914, HTSUS; all of the products put together carry out the specific activity of cultivating the growth of sunflower plants; and it is packaged in one container to be sold directly to the user.

Because the item is a set, we must determine which component provides the essential character. EN VIII to GRI 3(b), page 4, states that:

> [t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

In HQ 953946 (August 30, 1993), we found that the essential character of a sunflower growing kit matching the one at issue here was the sunflower seeds. HQ 953946 held that "[w]e believe that the * * * seeds form the essential character of the kits because without them the kits would serve no purpose." Therefore the classification of the set in the instant case will be the classification of the sunflower seeds, subheading 1206.00.0040, HTSUS.

Thus, in this case, the specific tariff rule applicable to the kit is set forth in § 102.20(m), Section II: Chapters 6 through 14, which states: "A change to heading 1201 through 1207

from any other chapter." In this case, the sunflower seeds do not undergo the necessary change in tariff classification. Therefore, the origin of the kit cannot be determined pursuant to section 102.11(a)(3). Moreover, section 102.11(b) is not applicable since the good (kit) is classified as a set. However, section 102.11(c) provides, *inter alia*, that for a good which is classified as a set under the HTSUS, the country of origin of such a good is the country or countries of origin of all materials that merit equal consideration for determining the essential character of the good. Since we find that each of the components of the kit *(i.e.* the seeds, pot and saucer, and growing mix) merits equal consideration for determining the essential character of the kit, the country of origin of the kit is the country of origin of each of these components. Inasmuch as the adhesive label lists the individual country of origin of each component, it is an acceptable country of origin marking under section 1304.

However, it should be noted that the canister qualifies as a "usual container" pursuant to 19 CFR § 134.22(d)(1), and as a usual container from a NAFTA country, the canister itself is excepted from country of origin marking under 19 CFR § 134.22(d)(2). Therefore, the words appearing on the adhesive label indicating the country of origin of the canister, although acceptable, are not required.

The first line of the adhesive label states that the sunflower growing kit is "PACKAGED IN CANADA". The marking of where the packaging occurs is not required, and could be removed. However, since it appears on the sample provided, it must satisfy the country of origin marking regulations. Section 134.46, Customs Regulations (19 CFR § 134.46), requires that when the name of any city or locality in the U.S., or the name of any foreign country or locality other than the name of the country or locality in which the article was manufactured or produced, appears on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. Customs has ruled that in order to satisfy the close proximity requirement, the country of origin marking must appear on the same side(s) or surface(s) in which the name of the locality other than the country of origin appears. HQ 708994 (April 24, 1978). The purpose of 19 CFR § 134.46 is to prevent the possibility of misleading or deceiving the ultimate purchaser as to the origin of the imported article. In this situation, the "PACKAGED IN CANADA" appears in larger print than the other country of origin designations. We find this to be a violation of 19 CFR § 134.46. Since "PACKAGED IN CANADA" is not required to appear on the product, it must either be removed, or the print size must be reduced so as to more closely match the print size of the country of origin designations of the contents.

Holding:

The adhesive label listing the individual countries of origin of the components of the sunflower growing kit is an acceptable method of country of origin marking. However, the marking on the front label "MONTREAL, CANADA" must be removed, and the words "PACKAGED IN CANADA" printed on the adhesive label must be either removed or reduced in size so that these words are more closely matched to the print size of the country of origin designations appearing on the canister for the contents.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–31)

INTERNATIONAL HOME TEXTILE, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–06–00347

[Judgment for defendant.]

(Dated March 18, 1997)

Peter S. Herrick for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Bruce N. Stratvert), Sheryl A. French,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

MEMORANDUM OPINION

DICARLO, *Senior Judge:* Plaintiff, International Home Textile, Inc., challenges the United States Customs Service's classification of imported garments under subheading 6103.42.10 of the Harmonized Tariff Schedule of the United States (HTSUS) for cotton pants and shorts and under subheading 6105.10.00 for cotton tops. HTSUS, § XI, ch. 61, subheadings 6103.42.10, 6105.10.00 (1993). Customs' classification levies general Most Favored Nation (MFN) tariff rates of 17.1% *ad valorem* for the pants and shorts and 21% *ad valorem* for the shirts. *Id.* Plaintiff claims the garments' proper classification is as sleepwear under subheading 6107.91.00 at 9.3% *ad valorem* or, alternatively, under subheading 6107.21.00 at 9.5% *ad valorem. Id.* at subheadings 6107.91.00, 6107.21.00 (1993 & Supp. I). Plaintiff timely filed a protest against the liquidation of the merchandise. Upon denial of the protest, plaintiff timely instituted this action. Jurisdiction is proper under 28 U.S.C. § 1581(a) (1994).

BACKGROUND

This dispute concerns the proper classification of imported garments consisting of a top, pants, and shorts made of lightweight 100% knit cot-

ton. The garments are loose fitting, with or without a fly and side seam pockets, and have elastic waistbands for the pants and shorts, and ribbed cuffs at the wrist and ankles.

Customs classified the garments as "[t]rousers, breeches and shorts" of cotton under subheading 6013.42.10 of the HTSUS, and as "[m]en's or boys' shirts, knitted or crocheted: of cotton" under subheading 6105.10.00 of the HTSUS. HTSUS, § XI, ch. 61, subheadings 6013.42.10, 6105.10.00.

International Home Textile disputes Customs' classification, claiming the merchandise is properly classified as "[m]en's or boys' underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and *similar articles*, knitted or crocheted," either under subheading 6107.91.00 ("other: of cotton") or, alternatively, under subheading 6107.21.00 ("nightshirts and pajamas: of cotton"). *Id.* at subheadings 6107.91.00, 6107.21.00 (emphasis added).

The parties have stipulated that the garments are properly considered loungewear, primarily used inside the home and around the house. The court furthermore found during trial that the garments are primarily for lounging and not for sleeping. (Ct. Ex. 1 at ¶¶ 1–2.)

DISCUSSION

This case is before the court after trial *de novo* pursuant to 28 U.S.C. § 2640(a)(1) (1994). The court makes its determinations "upon the basis of the record made before the court[.]" *Id.* By legislative mandate, the court may not decide the case simply by dismissing the importer's alternative as incorrect. 28 U.S.C. § 2643(b) (1994). It must reach the correct result by considering "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984); *Amity Leather Co. v. United States*, 20 CIT ____, 939 F. Supp. 891, 894 (1996).

Classification issues are resolved through "a two step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The first step is a question of law; the second, a question of fact. *Id.; Medline Industries, Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995); *Amity Leather*, 20 CIT at ____, 939 F. Supp. at 894; *Anval Nyby Powder AB v. United States*, 20 CIT ____, ____, 927 F. Supp. 463, 466–67 (1996). Plaintiff bears the burden of proving that Customs' determination is incorrect. 28 U.S.C. § 2639(a)(1) (1994).

In this case, the court must first analyze the scope of the term "similar articles" in HTSUS subheadings 6107.91.00 and 6107.21.00. Next, the court must determine whether "loungewear" comes within the description of items listed under subheadings 6107.91.00 and 6107.21.00, or rather comes within the description of items listed under subheadings 6103.42.10 and 6105.10.00. In the second step, plaintiff must overcome

the statutory presumption of correctness that operates in favor of Customs' factual determinations. 28 U.S.C. § 2639(a)(1) (1994) (describing presumption); *see Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (limiting presumption to factual determinations); *see also IKO Industries, Ltd. v. United States*, 105 F.3d 624, 626 (Fed. Cir. 1997) (citing *Goodman*).

Plaintiff argues that the garments, as "similar articles" under subheading 6107.91.00, or alternatively under 6107.21.00, are *ejusdem generis* ("of the same kind") with the named exemplars, such as nightshirts, pajamas, bathrobes, and dressing gowns, of heading 6107, HTSUS. (Pl.'s Post Trial Br. at 4.) For this to be so, the garments need to possess the essential purpose or characteristic of the named articles of heading 6107, HTSUS. *See Sports Graphics, Inc.*, 24 F.3d. at 1392. Plaintiff contends that their essential characteristic is that they are "worn next to the body * * * worn as sleepwear[,] and * * * worn in and around the home." (Pl.'s Post Trial Br. at 5.)

The court disagrees that the loungewear in question is, applying the rule of *ejusdem generis*, properly classified under either subheading 6107.91.00 or 6107.21.00 as a "similar article" to the named exemplars. In contrast to plaintiff's contention, not all of the exemplars are worn next to the skin (for instance, bathrobes are frequently worn over pajamas); not all of the exemplars are worn as sleepwear (for example, bathrobes or dressing gowns are worn before or after sleeping); and not all exemplars are meant to be worn only in and around the home (for example, briefs and underwear, when worn under outerwear garments, are worn outside the home). Rather, the court finds these items are characterized by a sense of privateness (underpants and briefs) or private activity (sleeping, bathing, and dressing).

Based upon a careful examination of the loungewear as well as the testimony of the various witnesses, the court finds that the loungewear items at issue do not share that essential character of privateness or private activity. As the parties have already stipulated, the loungewear is used primarily for lounging and not for sleeping. The court finds no basis in the exhibits, the witness testimony, or the loungewear's construction and design to find that it is inappropriate, at a minimum, for the loungewear to be worn at informal social occasions in and around the home, and for other individual, non-private activities in and around the house—*e.g.*, watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like. The court finds plaintiff's proposed classification heading does not encompass the loungewear in question.

The court finds that Customs' classification under HTSUS subheadings 6103.42.10 (knit cotton shorts and trousers) and 6105.10.00 (knit cotton shirts) does encompass the loungewear in question. Plaintiff concedes that the "loungewear, which includes tops, pants and shorts may also be described as shirts, trousers and shorts." (Pl.'s Post Trial Br. at

5.) Examination of the articles themselves further lead the court to find that plaintiff has not overcome Customs' presumption of correctness and that Customs' classification is appropriate. *See Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), *aff'd*, 786 F.2d 1144 (Fed. Cir. 1986) (explaining "[t]he former Court of Customs and Patent Appeals held that the merchandise itself may be strong evidence of use.") The Explanatory Notes to Chapter 61, HTSUS, provide that: (1) "Shirts * * * are garments designed to cover the upper part of the body, having long or short sleeves and a full or partial opening starting at the neckline. They may also have pockets, but only above the waist, and a collar[;]" (2) "'Trousers' means garments which envelop each leg separately, covering the knees and usually reaching down to or below the ankles; these garments usually stop at the waist;" and (3) "shorts [are] 'trousers' which do not cover the knee." 2 *Harmonized Commodity Description and Coding System: Explanatory Notes* 830, 834–35 (1st. ed. 1986); *see Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (noting that although they are not legally binding, explanatory notes are indicative of the proper interpretation of HTSUS headings). The court finds these descriptions match the articles at issue. Based upon examination of the merchandise, in conjunction with consideration of the trial testimony and all documents and exhibits submitted in this case, the court concludes that plaintiff has not overcome Customs' presumption of correctness and that the loungewear is properly considered and classified as shirts, trousers and shorts.

CONCLUSION

Based on the statutory language and the applicable case law, plaintiff has not presented sufficient evidence to override Customs' presumption of correctness. The court finds Customs' classification under subheadings 6103.42.10 and 6105.10.00, HTSUS, to be correct. Judgment will be entered accordingly.

(Slip Op. 97–32)

THAI PINEAPPLE PUBLIC CO., LTD., ET AL., PLAINTIFFS, AND DOLE FOOD CO., INC., ET AL., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND MAUI PINEAPPLE CO., LTD., DEFENDANT-INTERVENOR

Consolidated Court and No. 95–08–01064

[Commerce remand results sustained.]

(Dated March 18, 1997)

Willkie, Farr & Gallagher (Kenneth J. Pierce and *William B. Lindsey)* for plaintiffs.

Patton Boggs, L.L.P. (Michael D. Esch) for plaintiff- intervenors Dole Food Company, Inc., *et al.*

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Stacy J. Ettinger*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal and *Lynn E. Duffy)* for defendant-intervenor Maui Pineapple Co., Ltd.

OPINION

RESTANI, *Judge:* This matter is before the court following remand of an antidumping duty determination.

While the parties may dispute some of the court's conclusions in Slip Op. 96–182 issued herein, there seems to be no dispute that the Department of Commerce complied with the court's directions.

The one issue which arises solely from the remand is Commerce's decision to correct its own ministerial error. Apparently it programmed its computer with an improper currency conversion factor when the gross unit prices were already reported in U.S. dollars.

On several occasions this court has upheld decisions of Commerce not to correct errors which could have been discovered by the parties in a timely manner. This is particularly appropriate when belated error correction will have a ripple effect leading to further administrative proceedings or fact finding. The court does not ordinarily consider it an abuse of discretion if Commerce decides to correct isolated mistakes of its own. *See Cemex v. United States*, Slip Op. 96–170, at 2 (Oct. 24, 1996) ("programming errors are particularly susceptible to correction without administrative disruption"). As this matter was uncovered during a remand proceeding subject to narrowly drawn directions from the court, however, the better practice would have been for Commerce to have requested permission to correct the error. As Commerce's action was not clearly *ultra vires*, and resulted in proper error correction the court sees no purpose to ordering another remand to do what has been done.

The remand results will be sustained.

(Slip Op. 97–33)

DAVID W. SHENK & CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–08–00434

[Plaintiff's motion for summary judgment is denied; Defendant's motion for summary judgment granted. Judgment entered for the Defendant.]

(Decided March 19, 1997)

Peter S. Herrick, attorney for the Plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *John J. Mahon,* Civil Division, Dept. of Justice, Commercial Litigation Branch; *Mark G. Nackman,* Office of Assistant Chief Counsel, U.S. Customs Service, of counsel, for the Defendant.

OPINION

POGUE, *Judge:* This case is before the court on motions for summary judgment. Plaintiff, David W. Shenk & Co., challenges the decision of the United States Customs Service ("Customs") denying the plaintiff's protest against Customs' classification of the subject merchandise. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a)(1988).

Plaintiff, David W. Shenk & Co., ("Shenk") is the importer of record of certain acoustic couplers and parts of acoustic couplers from Japan. Upon importation, Customs classified the merchandise under subheadings 8517.82.00, 8517.90.55, 8517.90.60, HTSUS, which provide as follows:

8517	Electrical apparatus for line telephony or telegraphy, including such apparatus for carrier-current line systems; parts thereof:	
	Other apparatus:	
8517.82.00	Telegraphic	4.7%
8517.90	Parts:	
	Of telegraphic apparatus:	
8517.90.55	Of articles of subheading 8517.40.10	4.7%
8517.90.60	Of telegraphic switching apparatus	4.7%

The plaintiff claims that the merchandise should have been classified under subheading 8471.99.15, as control or adapter units for automatic data-processing machines, or, alternatively, under 8473.30.40, as parts and accessories of machines of Heading 8471, not incorporating a cathode ray tube; in other words, parts or accessories of automatic data-processing machines or units:

8471	Automatic data-processing machines and units thereof; magnetic optical readers, machines for transcribing data onto data media in coded form and ma-

	chines for processing such data, not elsewhere specified or included:	
	Other:	
	Other:	
8471.99.15	Control or adapter units	Free
8473	Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472:	
	Parts and accessories of machines of heading 8471:	
8473.30.40	Not incorporating a cathode ray tube	Free

UNDISPUTED FACTS

The acoustic couplers are telecommunication devices used for connecting computer modems to telephone handsets. They allow the transmission of data over public telephone lines between two points when no direct connection can be made. They are attached to a telephone handset and held in place by a hook-and-loop strap. They have a telephone-type cord which is connected to a modem, which, in turn, is connected to the central processing unit of a computer.

The telecouplers' principal function is to connect telephone handsets to computer modems when no modular jacks are available. They eliminate communication problems posed by RJ-11 jacks, digital phone systems, and foreign telephones.

The telecouplers use sending and receiving elements for modem communications and convert electronic analog (audio) signals into acoustic tone signals and vice versa. They can work with both analog and digital phone systems.

STANDARD OF REVIEW

The ultimate issue as to whether imported merchandise has been classified under the correct tariff provision entails a two-step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise in question comes within the description of such terms as properly construed. *Sports Graphics, Inc. v. United States,* 24 F.3d 1390, 1391 (1994). The first step is a question of law; the second, a question of fact. *EM. Chem. v. United States,* 9 Fed. Cir. (T) 33, 35, 920 F.2d 910, 912 (1990).

Rule 56 of this Court permits summary judgment when "there is no *genuine* issue as to any *material* fact * * *" USCIT R. 56(d) (emphasis added); *see also Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987). Similarly, Rule 56 of this Court specifically requires that the Court determine "what material facts are actually and in good faith controverted." USCIT Rule 56(e).

On the question of genuineness, the standard for determining whether there is *a genuine* issue of fact mirrors the standard for a directed ver-

dict which requires the trial judge to direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. "[T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." 477 U.S. at 255, 106 S.Ct. 2514; *see Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562–63 (Fed. Cir. 1987); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–323, 106 S.Ct. 2548, 2552 (1986) (Rule 56 "mandates the entry of summary judgment * * *, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Since there are no genuine issues of material fact to be resolved by a trial, the legal questions are ripe for determination by this Court. Accordingly, summary judgment is appropriate.

DISCUSSION

The Chapter Notes to Section 85 do not offer specific guidance on its scope. However, the Explanatory Note[1] to this section states in pertinent part:

> [t]he term 'electrical apparatus for line telephony or line telegraphy' means apparatus for the transmission between two points of speech or other sounds (or symbols representing written messages, images or other data), by variation of an electric current or of an optical wave flowing in a metallic or dielectric (copper, optical fibers, combination cable, etc.) circuit connecting the transmitting station to the receiving station * * *. The heading covers all such electrical apparatus designed for this purpose, including the special apparatus used for carrier-current line systems.

The same Note also addresses telegraphic apparatus, stating that it "is essentially designed for converting texts or images into appropriate electrical impulses, for transmitting those impulses, and at the receiving end, receiving these impulses and converting them either into conventional symbols or indications representing the text, or into the text of the image itself."

The telecouplers convert signals from computer modems to acoustic tone signals that can be accepted by telephone handsets and transmitted over telephone lines to another point. The telecouplers transmit data between two computer systems by connecting the transmitting station to the receiving station and, therefore, meet the requirements of an "electrical apparatus" in Heading 8517. They also assist computer modems, classified under subheading 8517.40.10, HTSUS, in performing their communication functions.

For the separately entered merchandise to be classified under the subheadings for automatic data-processing machines, the merchandise must satisfy the two-prong test found in Note 5(B) of Chapter 84 setting forth the criteria for classification as a unit of a data-processing ma-

[1] The Explanatory Notes to the HTSUS are not dispositive, but they are "generally indicative of the scope of the HTSUS." *See, Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992).

chine, or meet the definition of a part or accessory "suitable for use solely or principally with an automatic data processing (ADP) machine." 8473.30 HTSUS.

Note 5(B) states:

> Automatic data processing machines may be in the form of a variable number of separately housed units. A unit is to be regarded as being a part of the complete system if it meets all the following conditions: (a) it is connectable to the central processing unit either directly or through one or more other units; and (b) it is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in form (code or signals) which can be used by the system).

Note 5(B), Chapter 84, HTSUS. Additionally, Note 5(B) excludes from the scope of Chapter 84 "machines incorporating or *working in conjunction* with automatic data-processing machines and *performing a specific function*. Such machines are classified in the headings appropriate to their *respective functions* or failing that, in residual headings." *Id.* (emphasis added). Thus, the question before the Court is whether the couplers are designed as part of automatic data-processing systems, or work in conjunction with such systems to perform some specific function.

If the imported acoustic telecouplers perform specific telegraphic functions so that they work in conjunction, rather than as part of an ADP system, they would be excluded from heading 8471 by operation of Chapter Note 5(B), and Customs' classification would stand. If, on the other hand, the acoustic telecouplers function as part of an ADP system, as adapter units,[2] they should be classified under heading 8471.

"Adapter" is not specifically defined in the HTSUS. However, the NEW WEBSTER COMPUTER DICTIONARY 4 (1984) defines an adapter as "a connecting device that enables different parts of one or more systems or subsystems to interact with each other."

The defendant maintains that the telecouplers cannot be units of an automatic data-processing machine because they are connected to computers through modems, and, defendant says, modems are not units. By separately classifying modems, defendant claims, Congress must have intended to exclude them from the definition of units. According to defendant therefore, the couplers cannot satisfy the first prong of Chapter Note 5(B)'s two-part test. The Court is not persuaded by this argument. After all, a modem could satisfy both prongs of the statutory test for a unit. It is connected to a central processing unit either directly or through one or more other units, and it can be designed as a part of an automatic data-processing machine system.

Nevertheless, assuming a modem could be a unit, and assuming further that the couplers are specifically designed for use with automatic data-processing machines, the exclusionary language of Note 5(B) precludes classification of the telecouplers under heading 8471. The parties agree that the telecouplers perform certain telegraphic functions pro-

[2] *See* 8471.99.15 HTSUS

viding interconnection between telephone handsets and computer modems when no modular jacks are available. Heading 8517 covers telegraphic functions. The exclusionary language of Note 5(B) states that "machines *working in conjunction* with automatic data-processing machines and performing a *specific function* * * * are classified in the headings appropriate to their *respective functions*." (emphasis added). The telecouplers work in conjunction with a modem performing telegraphic functions; therefore, they are properly classified under Heading 8517.

To prevail on its claim, plaintiff would have had to produce evidence that the telecouplers perform data processing functions, making them an integral component, or part, of a data processing machine. In the summary judgment context, plaintiff's statements that, "The telecoupler is designed to serve ADP machines not to serve telephone systems," and that, "The principal and essential function of the telecoupler is to interconnect computers," (Pl.'s Pre-Trial Summ. Mem. of Law and Mot. for Summ. J. at 8) are unsupported conclusory allegations and do not create genuine issues of material fact.

The only evidence the Court has before it on the telecouplers' function is the undisputed fact that "[t]he principal function of the telecoupler is to provide interconnection between a telephone handset and a computer modem." (Undisputed Facts ¶ 11). It is equally undisputed that the couplers enhance the effectiveness of a modem by eliminating "the problems with RJ-11 jacks, digital phone systems and foreign telephones * * *." (Undisputed Facts ¶ 10). Therefore, although the couplers would appear to fit the broad definition of an adapter, they are more accurately described as accessories to modems.[3] There is of course no provision for accessories of modems, but there is a residual provision within the heading containing modems. In accordance with the language of Note 5(B) of Chapter 84, the telecoupler must be classified in a residual heading appropriate to its *respective function* as an accessory to a modem. That heading is 8517.82.00.

Plaintiff also argues, in the alternative, that the telecouplers are properly classifiable as "parts and accessories" to automatic data-processing machines, and thus fall under 8473.30.40 HTSUS. However, plaintiff has failed to make a case that the telecouplers assist computers in their data-processing function more than they assist modems in their telegraphic function.

The genuineness of a disputed question of fact must be judged by the substantive evidentiary standard applicable to the case. *See Henry Mast*

---

[3] Determining the common and commercial meaning of the term "accessory, " in *Auto-Ordnance Corp., v. United States*, 822 F.2d 1566 (Fed. Cir. 1987), the Court of Appeals for the Federal Circuit recognized that:

> [s]ince the regulations neither specify what are the component parts of a complete [article], nor define the term "accessory," it is appropriate for the Court to look beyond the language of the regulation in order to ascertain the meaning of the term "accessories" * * *. An accessory is commonly defined as "a thing of secondary or subordinate importance. An object or device that is not essential in itself but adds to the beauty, convenience or effectiveness of something else." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (1981). Another source defines accessory as "equipment, usually demountable and replaceable," that is added "for convenience, comfort, safety or completeness." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 11 (2d ed. 1983).

822 F.2d at 1570.

Greenhouses, Inc. v. United States, slip op. 95–198 at 8 (Dec. 4, 1995). In a classification case, Customs' factual conclusions are presumed to be correct, 28 U.S.C. § 2629(a)(1), and the plaintiff has the burden of overcoming that presumption by a preponderance of the evidence. *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993). Here Customs concluded that the telecouplers perform telegraphic functions, and therefore classified them under heading 8517, HTSUS. Plaintiff failed to present evidence to dispute this conclusion. Modems are classified in heading 8517; telecouplers, if thought of as performing telegraphic functions in conjunction with modems, or if thought of as accessories to modems would have to be classified in this heading as well. On this record, the defendant must prevail.

CONCLUSION

Chapter Note 5(B) excludes the telecouplers from classification under heading 8471 and directs that they are classified according to their telegraphic function under heading 8517. *See Nidec Corp. v. United States*, 68 F.3d 1333 (Fed. Cir. 1995) ("where a Chapter Note clearly resolves any question of interpretation the court need look no further"). Parts of the acoustic telecouplers also fall within the scope of Heading 8517.

Defendant's proposed classification under Heading 8517 encompasses the merchandise and is, on the record before the Court, the legally correct classification. Accordingly, for the reasons stated above, Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted. The imported telecouplers and parts of telecouplers should be classified under HTSUS Headings 8517.82.00 and 8517.90.55, as other telegraphic apparatus and parts of telegraphic apparatus at 4.7% ad valorem.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/44 3/19/97 Carman, J.	Semperit Industrial Products, Inc.	91–10–00765–S	4010.91.15 8%	4010.91.19 2.4%	Semperit Industrial Products, Inc. *v.* U.S., June 14, 1994 Slip Op. 94–100, Court No. 90–10–00566	Seattle, WA Industrial conveyor belts
C97/45 3/19/97 Carman, J.	Semperit Industrial Products, Inc.	93–05–00259–S	4010.91.15 8%	4010.91.19 2.4%	Semperit Industrial Products, Inc. *v.* U.S., June 14, 1994 Slip Op. 94–100, Court No. 90–10–00566	Seattle, WA Industrial conveyor belts
C97/46 3/21/97 Carman, J.	Kuka Welding Systems & Robot Corp.	92–08–00576	8479.89.90 and/or 8479.90.80 3.7% 678.50 3.7%	8515.31.00 2.0% and/or 683.90 2.0% 8515.90.20 2.0% and/or 683.90 2.0%	Agreed statement of facts	Detroit, MI Industrial robots and parts

Index

Customs Bulletin and Decisions
Vol. 31, No. 15, April 9, 1997

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Federal Recycling Program
Printed on Recycled Paper
U.S. G.P.O. 1997–417–405–40028